Office-Supreme Court, U.S.
FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

(5)

No. 84-890

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMORY WORTH BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury that if it found petitioner not guilty of bribery under 18 U.S.C. 201(c), it should consider whether he was guilty of the lesser included offense of accepting a gratuity under 18 U.S.C. 201(g).

2. Whether the district court's instructions on the offense of accepting a gratuity were erroneous.

3. Whether the evidence was sufficient to support petitioner's conviction for accepting a gratuity.

4. Whether the evidence was sufficient to support petitioner's convictions for conflict of interest under 18 U.S.C. 208(a).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Henderson v. *Kibbe*, 431 U.S. 145 5

Keeble v. *United States*, 412 U.S. 205 4

Sansone v. *United States*, 380 U.S. 343 4

United States v. *Brewster*, 506 F.2d 62 ..... 4, 5

United States v. *Conlon*, 628 F.2d 150 7

United States v. *Crutchfield*, 547 F.2d 496 4

United States v. *Frady*, 456 U.S. 152 5

United States v. *Harary*, 457 F.2d 471 4

United States v. *Irons*, 640 F.2d 872 7

United States v. *Niederberger*, 580 F.2d 63, cert. denied, 439 U.S. 980 5

United States v. *Powell*, No. 83-1307 (Dec. 10, 1984) 5

United States v. *Raborn*, 575 F.2d 688 4

Page

Cases—Continued:

United States v. *Umans*, 368 F.2d 725, cert. dismissed, 389 U.S. 80 4

United States v. *Williams*, 705 F.2d 603, cert. denied, 464 U.S. 1007 6

Statutes and rules:

18 U.S.C. 201(c) 1, 4

18 U.S.C. 201(c)(1) 3

18 U.S.C. 201(g) 1, 3, 4

18 U.S.C. 208(a) 1, 7

18 U.S.C. 641 1

18 U.S.C. 1001 1

Fed. R. Crim. P. :

Rule 30 5

Rule 31(c) 4

Rule 52(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-890

EMORY WORTH BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1984. A petition for rehearing was denied on September 21, 1984 (Pet. App. 19a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of accepting a gratuity, in violation of 18 U.S.C. 201(g), and three counts of conflict of interest, in violation of 18 U.S.C. 208(a).[1] He was sentenced to

[1]Petitioner was acquitted on one count of bribery (18 U.S.C. 201(c)), six counts of theft of government property (18 U.S.C. 641), nine counts of making a false statement (18 U.S.C. 1001), and four counts of conflict of interest (18 U.S.C. 208(a)).

concurrent one-year terms of imprisonment, suspended in favor of three years' probation, and fined $5,000. The court of appeals affirmed (Pet. App. 1a-18a).

1. a. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 2a-10a), showed that petitioner was the commanding officer of a squadron of F-14 fighter planes stationed aboard the U.S.S. Nimitz. In 1979, the Navy entered into a contract with a civilian motion picture company in connection with production of the film "The Final Countdown." The contract provided that petitioner's squadron would fly in certain scenes of the movie and that the Navy would receive $4,000 per hour of flight time for the use of its personnel and equipment. It was petitioner's obligation to document the hours flown for billing purposes. The contract specified that no Naval personnel would be paid for work done on the movie while performing their official functions and that the producer could not contract with any Naval personnel for the performance of services related to production of the movie. *Id.* at 2a-4a.

Although petitioner admitted to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time, he submitted records showing that his squadron had flown only 32.5 hours, resulting in an undercharge of more than $400,000 (Pet. App. 6a). Petitioner also presented to the producer an invoice from Binnacle Enterprises, petitioner's own table-making business, for "set materials" (*id.* at 5a). The same day, the producer delivered a check for $5,563.48 to petitioner's residence. Petitioner admitted to the FBI agent that the materials were not in fact purchased and that the invoice was "bogus" (*id.* at 5a-6a). Finally, when the producer disputed the Navy's claim for payment of certain administrative expenses, petitioner telegraphed him to urge him to

pay promptly in order to avoid an investigation that might reveal the underbilling for flight time (*id.* at 6a-7a).

b. Petitioner and a former naval officer had established Binnacle Enterprises in 1978 in order to produce and sell tables made from ship hatch covers. On three separate occasions, petitioner used Navy funds to purchase furniture from Binnacle Enterprises, without disclosing to the Navy his interest in the company. Petitioner admitted that he made some profit from the transactions. Pet. App. 7a-10a.

2. Petitioner was convicted on one count of accepting an illegal gratuity for his acceptance of the check from the movie producer and three counts of conflict of interest in connection with the purchases from Binnacle Enterprises. The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-18a). The court concluded that it was proper to instruct the jury to consider the lesser included offense of accepting a gratuity, that the instructions were not erroneous, and that the evidence was sufficient to support the convictions (*id.* at 10a-17a).

ARGUMENT

1. Petitioner contends (Pet. 34-35, 42-44, 45) that the district court should not have given an instruction on the offense of accepting a gratuity under 18 U.S.C. 201(g). Petitioner was charged with accepting a bribe, in violation of 18 U.S.C. 201(c)(1), in connection with his receipt of over $5,000 from the producer of "The Final Countdown." Section 201(c)(1) prohibits a public official from "corruptly * * * receiv[ing] anything of value * * * in return for * * * being influenced in his performance of any official act." The court instructed the jury that, if it found petitioner not guilty of bribery, it should consider whether he was guilty of the lesser included offense of accepting a gratuity in violation of Section 201(g). That Section prohibits public officials from accepting anything of value "for or because of any official act performed or to be performed by him."

Petitioner's argument that he was not on notice that he might have to defend against the gratuity charge is meritless. It is well established that accepting an illegal gratuity is a lesser included offense of bribery and that where a defendant is charged with bribery under Section 201(c) an illegal gratuity instruction may be given. See *United States* v. *Raborn*, 575 F.2d 688, 691 (9th Cir. 1978); *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974); *United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967); Fed. R. Crim. P. 31(c). As the court stated in *Raborn* (575 F.2d at 691), "when charged under § 201(c), a defendant is on notice that he must defend against the lesser included offense defined in § 201(g)."

Petitioner's argument that the charge was improper because he could not rationally be found innocent of bribery yet guilty of accepting a gratuity[2] is similarly unavailing. The offenses are different in at least two respects relevant here. First, "a higher degree of criminal intent" is required for the bribery offense. *United States* v. *Brewster*, 506 F.2d at 71; see also *United States* v. *Umans*, 368 F.2d at 728-730. The jury could quite rationally have concluded that petitioner lacked the "corrupt[]" intent necessary to convict under Section 201(c) although he had whatever lesser criminal intent, if any, required to violate Section 201(g). Indeed, petitioner has argued throughout this case that he did not act with corrupt intent.[3] Second, bribery " 'makes necessary an explicit *quid pro quo* which need not exist if

---

[2]See generally *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965).

[3]Petitioner's reliance (Pet. 34) on *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972), is misplaced, because the defendant there had conceded the existence of specific intent, and so there was, on the facts presented, no rational distinction between the bribery and gratuity offenses. See *United States* v. *Crutchfield*, 547 F.2d 496, 501-502 n.4 (9th Cir. 1977).

only an illegal gratuity is involved.' " *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978), quoting *United States* v. *Brewster*, 506 F.2d at 72. The difference is that a bribe causes the official act to be performed, while an illegal gratuity may be paid "because of" an official act even if that act would have been performed in the absence of the payment (*ibid.*). There was evidence to support such a distinction here: the money was not paid until after petitioner had understated the hours to his superior, and there was no evidence of a prior agreement between petitioner and the producer.[4]

2. Petitioner contends (Pet. 35-40) that the court's charge on the elements of the illegal gratuity offense was incorrect. Petitioner argues that the charge (including a supplemental charge given at the jury's request) failed to distinguish a gratuity from bribery and failed to indicate that the check petitioner received could not constitute "anything of value" if it represented reimbursement for funds he expended. Petitioner did not object to the charge on these grounds at trial; review at this stage is not warranted. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).[5]

---

[4]Even if petitioner were correct that the evidence did not leave room for rational distinction between bribery and gratuity, he would not be entitled to relief, since the acquittal of the greater offense would not demonstrate that the jury had found one of the elements of the lesser to be unproved, but could equally be explained by jury lenity. Cf. *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984).

[5]Petitioner's sole objection at trial to the charge on accepting a gratuity was to the district court's use of the phrase "as a result of" in the supplemental charge (Tr. 1433). The court of appeals correctly rejected this argument, reasoning that the court's phrase was "essentially synonymous" with the statutory language (Pet. App. 15a). The court of appeals also noted that the precise statutory language was used in the district court's original instruction and that petitioner's requested language was an incorrect statement of the law (*id.* at 15a-16a).

In any event, petitioner's contentions are without merit. The district court clearly distinguished the two offenses. It repeatedly stated that bribery involves "the intent to be influenced in some official act" (Tr. 1378; see also Tr. 1377, 1379). It explained that the gratuity offense, however, required only a finding that "as a result of doing that which he was required to do, [petitioner] was given the money and he accepted it" (Tr. 1431). This adequately distinguished the offenses.[6] And while an instruction on the definition of "anything of value" might have been appropriate had petitioner asked for one, the failure to give one surely was not plain error — even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment.[7] Cf. *United States* v. *Williams*, 705 F.2d 603, 622-623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).

3. Petitioner's factbound claim (Pet. 32-33, 61-64) that the evidence was insufficient to support his conviction for accepting a gratuity was correctly rejected by the court of appeals (see Pet. App. 14a) and does not merit further review. There was ample evidence on the basis of which the jury could conclude that the payment was made "because of" petitioner's understatement of his squadron's flight hours: petitioner admitted that the invoice was phony (C.A. App. 339); the movie's art director confirmed that no set

---

[6]Petitioner's objection is a curious one. Surely he was not prejudiced if the bribery instruction was more favorable to him than it should have been. Nor was he prejudiced if the gratuity charge unnecessarily included additional elements of the bribery offense (which it did not). To the extent that his real objection is to the possibility of a compromise verdict, it is answered by the fact that the evidence supported giving the lesser included offense charge (see pages 4-5, *supra*).

[7]The contract between the Navy and the producer specified that the producer could not contract with Navy personnel for the performance of movie-related services (Pet. App. 4a).

was built with the materials enumerated in the invoice (*id.* at 120-122); petitioner admitted that he asked the producer to make the check payable to Binnacle Enterprises to avoid the appearance of a bribe (*id.* at 197-198); and petitioner telegraphed the producer concerning the need to avoid an inquiry into the reporting of flight time (*id.* at 198-A).

4. Finally, petitioner renews (Pet. 47-56) his argument that the evidence was insufficient to support his conflict-of-interest convictions under 18 U.S.C. 208(a). The court of appeals correctly rejected this argument, noting that petitioner's position "borders on the frivolous" (Pet. App. 16a).

Petitioner's argument is that the statute does not reach his conduct because it contains an implicit exception for de minimis transactions.[8] Section 208(a) prohibits, with exceptions not relevant here, any government officer or employee from "participat[ing] personally and substantially * * * [in a] matter in which, to his knowledge, he * * * has a financial interest." Quite clearly, Congress required only that the official's participation, and not his financial interest, be "substantial[]." Petitioner does not contend that he did not substantially participate in the self-dealing for which he was convicted. His argument that his financial interest in the transactions was required to be substantial as well is belied by the plain language of the statute. See generally *United States* v. *Irons*, 640 F.2d 872, 876-878 (7th Cir. 1981); *United States* v. *Conlon*, 628 F.2d 150 (D.C. Cir. 1980). And contrary to petitioner's argument, there was evidence that he did profit from the sales (Pet. App. 9a; C.A. App. 193-195, 367).

---

[8]Here, the three sales were for amounts ranging from $135 to $145.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JANUARY 1985

DOJ-1985-01